

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

BERNARD E. PENDER,

Plaintiff

v.

**SERGEANT DARRELL GUY and
DARBY BOROUGH,**

Defendants.

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CIVIL ACTION

NO. 01-4050

DuBOIS, J.

JUNE 18, 2002

MEMORANDUM

I. INTRODUCTION

On June 3, 1998, defendant Sergeant Darrell Guy, a Darby Borough police officer, arrested plaintiff, Bernard E. Pender. This litigation arises out of that arrest. Plaintiff alleges in his Complaint filed under 42 U.S.C. § 1983 that the arrest was made in violation of rights guaranteed to him by the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution.

Presently before the Court are Defendants' Motion to Dismiss Plaintiff's Amended Complaint (Document No. 7, filed November 16, 2001) and related filings. Because the Court agrees with defendants' argument that plaintiff's claims are barred by the relevant statute of limitations, the Court grants defendants' Motion and dismisses with prejudice plaintiff's Amended Complaint.

II. PROCEDURAL HISTORY

Plaintiff initiated his action against defendants in the Court of Common Pleas for

Delaware County on June 2, 2000, one day shy of the two-year anniversary of his June 3, 1998, arrest. To commence the action, plaintiff filed a Praecipe for a Writ of Summons, as permitted under Pa. R. Civ. P. 1007.¹ More than two months later, on August 10, 2000, plaintiff, having not yet served the summons on defendants, filed a Praecipe to Reissue the Writ of Summons pursuant to Pa. R. Civ. P. 401(b)(1). After nearly another two months, on October 12, 2000, plaintiff had still not served the summons and, again, filed a Praecipe to Reissue the Writ of Summons. On October 19, 2000, an Affidavit of Service of the Summons was filed.

On November 17, 2000, defendants had not yet received service of a complaint and filed a Rule to File a Complaint. Plaintiff had still not filed a complaint by February 23, 2001, on which date defendants filed, pursuant to Pa. R. Civ. P. 237.1, a Praecipe for Entry of Judgment of Non Pros against plaintiff. A Judgment of Non Pros was entered against plaintiff on that same date.

On February 26, 2001, plaintiff filed a Complaint. Thereafter, on March 14, 2001, plaintiff filed a Petition to Open Judgment of Non Pros. Defendants filed a response to plaintiff's Petition on March 29, 2001. A hearing was held on the Petition on May 11, 2001, and, on June 21, 2001, defendants filed a supplemental memorandum of law in reply to plaintiff's petition. On July 19, 2001, the Court of Common Pleas, by summary order, granted plaintiff's Petition and opened the Judgment of Non Pros.

Thereafter, on August 8, 2001, defendants removed the action to this Court. Defendants filed a motion to dismiss plaintiff's complaint. On October 10, 2001, the Court, concluding that

¹ The Court derives this procedural history from a certified copy of the record of the state-court proceedings, which was forwarded directly to the Court in Chambers. The certified copy of the record will be docketed with this Memorandum and Order.

plaintiff's Complaint "contains a hodge-podge of allegations and statutes, some of which appear to be actionable and others of which do not appear to be applicable to the case," granted defendants' motion without prejudice to plaintiff's right to file and serve an Amended Complaint. Plaintiff filed an Amended Complaint (Document No. 6) on October 29, 2001. Defendants then filed the instant Motion to Dismiss arguing, inter alia, that plaintiff's claims are barred by the statute of limitations.

III. DISCUSSION

The statute of limitations for plaintiff's § 1983 claims is two years. See Sameric Corp. of Del., Inc. v. City of Philadelphia, 142 F.3d 582, 599 (3d Cir. 1998) (citing 42 Pa. C.S.A. § 5524) (explaining federal rule requiring application to § 1983 of Pennsylvania's two-year statute of limitations for personal injury claims). Plaintiff does not dispute that his cause of action accrued on June 3, 1998, the date of his arrest. See id. ("A section 1983 cause of action accrues when the plaintiff knew or should have known of the injury upon which its action is based."). Thus, without any tolling, the two-year statutory period for plaintiff's § 1983 claims ran until June 3, 2000.

Defendants argue that plaintiff's filing of the Praecipe for a Writ of Summons on June 2, 2000, one day before the expiration of the statutory period, tolled the statute of limitations for only thirty days. Accordingly, defendants argue, the statute of limitations began to run again on July 2, 2000, and the statutory period expired just one day later, on July 3, 2000, well before plaintiff reissued the Writ of Summons on August 12, 2000.

Plaintiff raises three arguments in response: (1) plaintiff's filing a Writ of Summons and reissuing that Writ of Summons continued to toll the statute of limitations until plaintiff filed his

Complaint, thereby preventing the statutory period from expiring; (2) the granting of plaintiff's Petition to Open Judgment of Non Pros implicitly rejected defendants' statute of limitations defense and that rejection became the law of the case; and (3) defendants waived the statute of limitations defense by failing to raise it as "new matter" in their two responses to plaintiff's Petition to Open Judgment of Non Pros. The Court will address each of these arguments in turn.

A. EFFECT OF FILING A WRIT OF SUMMONS

Plaintiff argues that the statute of limitations was tolled from the time he filed his Writ of Summons on June 2, 2000, until he filed his Complaint on February 26, 2001. Plaintiff's argument is based on the "equivalent period" doctrine. That doctrine allows a party, upon the filing of a writ of summons, to keep an action "alive" for a period of time equivalent to the applicable limitations period notwithstanding the party's failure to effect service of the summons. See Witherspoon v. City of Philadelphia, 768 A.2d 1079, 1083-84 (Pa. 2001) (discussing equivalent period doctrine).²

In raising this argument, however, plaintiff fails to consider that "the filing of a praecipe for a writ of summons will only toll the statute of limitations if, during the life of the writ, the plaintiff makes a good faith attempt to effectuate service of the writ." Moses v. T.N.T. Red Star Express, 725 A.2d 792, 796 (Pa. Super. Ct. 1999) (citing Farinacci v. Beaver County Indus. Dev. Auth., 511 A.2d 757, 759 (Pa. 1986); Siler v. Khan, 689 A.2d 972, 973 (Pa. Super. Ct. 1997)). The "life of the writ" is thirty days. See Pa. R. Civ. P. 401(a) ("Original process shall be served within the Commonwealth within thirty days after the issuance of the writ or the filing of the

² The Court notes that in Witherspoon the Supreme Court of Pennsylvania abrogated much of the equivalent period doctrine. This Court does not base its decision in this case on Witherspoon, however, because it was decided after plaintiff initiated his action in state court.

complaint.”).

In light of these principles, the equivalent period doctrine is inapplicable to this case. Plaintiff filed the Writ of Summons on June 2, 2000, and, pursuant to Pa. R. Civ. P. 401(a), the Writ expired on July 2, 2000. Plaintiff makes no factual allegations, however, that he made any good faith attempt to serve the Writ before its expiration. Thus, on July 2, 2000, the statute of limitations, although tolled during the life of the Writ, continued to run and expired on July 3, 2000. The Court therefore rejects plaintiff’s argument that his filing of the Writ of Summons prevented the running of the statute of limitations.

B. EFFECT OF OPENING THE JUDGMENT OF NON PROS

Plaintiff next argues that the Court of Common Pleas’ July 19, 2001, summary order granting plaintiff’s Petition to Open Judgment of Non Pros necessarily rejected defendants’ statute of limitations defense which defendants argued in both of their memoranda opposing plaintiff’s petition. The implicit ruling on the statute of limitations defense, plaintiff argues, is now the law of the case, and this Court must adopt it. See Bolden v. Southeastern Pa. Transp. Auth., 21 F.3d 29 (3d Cir. 1994) (“The law of the case doctrine applies...to issues decided by necessary implication.”). The Court concludes, however, that plaintiff’s position on the threshold question – that the granting of the petition necessarily included a rejection of the statute of limitations defense – is incorrect.

A plaintiff’s petition for relief from a judgment of non pros when the judgment is based on the plaintiff’s failure to file a complaint, as it was in this case, is governed by Pa. R. Civ. P. 237.3. That rule states three criteria for opening a judgment of non pros: (1) the petition should be timely filed; (2) the reason for the default must be “reasonably explained or excused”; and (3)

“facts constituting grounds for a cause of action” must be alleged. Cohen v. Mirin, 729 A.2d 1236, 1238 (Pa. Super. Ct. 1999) (citing Pa. R. Civ. P. 237.3); see also Simmons v. Luallen, 763 A.2d 810, 812 (Pa. Super. Ct. 2000) (discussing standard for relief from judgment of non pros). The third criterion refers to the requirement in Pa. R. Civ. P. 237.3(b) that the plaintiff’s complaint “state[] a meritorious cause of action.” Plaintiff’s law-of-the-case argument is based on the assumption that this criterion requires a court ruling on a petition to open a judgment of non pros to consider any affirmative defenses to the cause of action, such as a statute of limitations defense.

The Court rejects plaintiff’s law-of-the-case argument. Pennsylvania courts have taken an approach contrary to plaintiff’s position. An example is the Cohen case where the Superior Court reversed a trial court’s denial of a petition to open a judgment of non pros in part because it found that the “proposed complaint contained sufficient allegations of the elemental aspects of a legal malpractice claim.” Cohen, 729 A.2d at 1238. The court granted the petition notwithstanding its conclusion that the plaintiff’s claim was likely barred by the relevant statute of limitations: “While it may be that the lower court will eventually find Appellant’s claims to be time-barred, and thus, not meritorious, such determination by the lower court at this time is premature, since the statute of limitations is an affirmative defense to be pled in New Matter.” Id. at 1238 n.4. Cohen thus demonstrates that a plaintiff can state a “meritorious cause of action” for purposes of Pa. R. Civ. P. 237.3(b) even if that cause of action is clearly barred by a statute of limitations.

The Court concludes that, under Pennsylvania law, a statute of limitations defense is irrelevant to the Court of Common Pleas’ consideration of a petition to open a judgment of non

pros. Accordingly, this Court does not find the Court of Common Pleas' granting of plaintiff's petition to have implicitly rejected defendants' statute of limitations defense.

C. WAIVER OF STATUTE OF LIMITATIONS DEFENSE

Plaintiff's final argument is that defendants waived the statute of limitations defense because they did not plead it as "New Matter." Plaintiff is correct to point out that "all affirmative defenses...shall be pleaded in a responsive pleading under the heading 'New Matter,'" and that all such affirmative defenses not so pled are waived. Pa. R. Civ. P. 1030. However, plaintiff's argument that defendants waived the statute of limitations defense by arguing it in their two responses to plaintiff's petition to open judgment of non pros, but not including it under a "New Matter" heading, is off the mark.

Rule 1030 explicitly applies only to "responsive pleadings." The rules further define "pleadings" as "limited to a complaint, an answer thereto, a reply if the answer contains new matter or a counterclaim, a counter-reply if the reply to a counterclaim contains new matter, a preliminary objection and an answer thereto." Pa. R. Civ. P. 1017. Under this narrow definition, a petition to open a judgment of non pros does not constitute a "pleading." Accordingly, defendants' responses to the petition cannot be considered "responsive pleadings," and defendants were not required to include their statute of limitations defense under a "New Matter" heading in their responses to plaintiff's petition. Cf. Boris v. Liberty Mut. Ins. Co., 515 A.2d 21, 23 (Pa. Super. Ct. 1986) (holding that a petition for appointment of an arbitrator is not a pleading and explaining that "[i]t would be anomalous to impose the pleading burdens of a civil action on a party responding to a mere petition, especially since there is no duty to answer such a petition

in the first instance”).

Because defendants did not waive their statute of limitations defense in state court, the Court concludes that defendants permissibly raised the defense in their Motion to Dismiss Plaintiff’s Complaint and in the present Motion to Dismiss Plaintiff’s Amended Complaint.

IV. CONCLUSION

For the foregoing reasons, the Court grants Defendants’ Motion to Dismiss Plaintiff’s Amended Complaint.

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FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

BERNARD E. PENDER,

Plaintiff

v.

**SERGEANT DARRELL GUY and
DARBY BOROUGH,**

Defendants.

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CIVIL ACTION

NO. 01-4050

ORDER

AND NOW this 18th day of June, 2002, upon consideration of Defendants' Motion to Dismiss Plaintiff's Amended Complaint (Document No. 7, filed November 16, 2001) and related filings, **IT IS ORDERED** that Defendants' Motion to Dismiss Plaintiff's Amended Complaint is **GRANTED WITH PREJUDICE** and **JUDGMENT IS ENTERED** in **FAVOR** of defendants Sergeant Darrell Guy and Darby Borough and **AGAINST** plaintiff Bernard E. Pender.

IT IS FURTHER ORDERED that a certified copy of the record of the state court proceedings in this case shall be **DOCKETED**.

BY THE COURT:

JAN E. DuBOIS, J.